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In The Supreme Court Of The United States

EDWARD S. ALAMEIDA, et al.,
Petitioners,

v.

KARLUCK M. MAYWEATHERS, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF OHIO AND 33 OTHER *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF *AMICI* INTEREST

The *Amici* States do not lightly challenge a federal statute, but we are compelled to do so here. That is because the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") further complicates the States' ability to effectively manage prisons, a task that was already one of "the most vexing of all state responsibilities." *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 137 (1977) (Burger, C. J., concurring). The RLUIPA statute essentially replaces the constitutional standard of review for prisoner claims—namely, that prison regulations implicating religious exercise are valid if they are reasonably related to legitimate penological interests, *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987)—with a statutory standard that requires States to yield to prisoners' Free Exercise demands unless their regulations are "the least restrictive means of furthering a compelling governmental interest." 42 U.S.C. § 2000cc-1(a)(2). That least-restrictive-means test, as shown by experience under both the former Religious Freedom Restoration Act ("RFRA"), and now under RLUIPA, burdens States in at least two ways.

First, RLUIPA contributes to the great uncertainty about the legal standards controlling prisoners' Free Exercise demands. The law has changed dramatically in recent years, alternating between rational basis review and strict scrutiny three times in the last decade alone. That constantly changing legal environment adds significant complexity to the already difficult task of balancing the protective demands of the Eighth Amendment against the counter pressure of Free Exercise requirements.

But the number and magnitude of those changes are not the only sources of uncertainty. The least-restrictive-means test is itself so inherently unpredictable that it independently muddies the already-unclear waters. It simply does not, in the

correctional setting, tell States what is expected of them. That test has been tried twice before, and it twice left corrections officials guessing.

Before *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), the least-restrictive-means test was applied in prisoner cases, and courts reached contradictory results as to the propriety of indistinguishable actions. *Compare Fromer v. Scully*, 817 F.2d 227 (2d Cir. 1987) (grooming regulations invalid) with *Martinelli v. Dugger*, 817 F.2d 1499 (11th Cir. 1987) (grooming regulation valid). *Compare also United States v. Huss*, 394 F. Supp. 752 (S.D.N.Y. 1975) (supplemental opinion) (special diet not required), *vacated on other grounds*, 520 F.2d 598 (2d Cir. 1975) with *Barnett v. Rodgers*, 410 F.2d 995 (D.C. Cir. 1969) (special diet required). Indeed, that test was abandoned because "every administrative judgment [was] subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand." *Turner v. Safley*, 482 U.S. 78, 89 (1987).

The accuracy of that observation was reconfirmed by RFRA, which once again provided antithetical answers about the legality of identical policies. *Compare Diaz v. Collins*, 872 F. Supp. 353, 359 (E.D. Tex. 1994) (upholding grooming regulations); *Phipps v. Parker*, 879 F. Supp. 734, 736 (W.D. Ky. 1995) (same) with *Estep v. Dent*, 914 F. Supp. 1462, 1467 (W. D. Ky. 1996) (invalidating grooming regulations); *Luckette v. Lewis*, 883 F. Supp. 471, 481 (D. Ariz. 1995) (same). Indeed, corrections officials received contradictory decisions about the same regulations in the same court, *Phipps, supra; Estep, supra.* That uncertainty undercuts the States' ability to "anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Turner*, 482 U.S. at 89.

Second, that uncertainty significantly complicates the job of combating prison gangs. "[O]fficials have noticed the common practice of prisoners 'adopting' [] religions . . . in order to get [] privileges." *Dangerous Convictions: An Introduction to Extremist Activities in Prisons*, 35 (Anti-Defamation League 2002). For example, "[w]hite supremacists in prison frequently claim adherence to religious sects . . . as a way to circumvent prison regulations," *id.* at 37, and they have openly advised their cohorts on how to abuse religious accommodations to further very unholy ends. *Id.* at 36. Inmates were quick to manipulate RFRA for such purposes, seizing on its strict scrutiny to undermine corrections officials' efforts to act against prison gangs. That pattern has re-emerged under RLUIPA, with white supremacists and other gangs invoking the Act in attempts to thwart previously validated anti-gang measures. The States need clear standards so they can confidently implement strategies for countering that problem, a problem that results in significant human suffering every day by inmates who lack the ability to flee the gangs' growing influence.

REASONS FOR GRANTING THE WRIT

California's petition should be granted for two reasons.

First, it presents an opportunity to end a period of unprecedented uncertainty about the legal standards controlling prisoners' Free Exercise claims—uncertainty that greatly complicates prison management.

Second, this Court should address the latest source of that uncertainty, RLUIPA, sooner rather than later because the present state of the law impedes the States' ability to address the increasingly urgent problem of prison gangs, a problem that causes very real human suffering every day. No further development is needed to fully address the purely legal issues involved. Finally, a decision here would help to resolve a growing number of other cases involving the questions presented here.

A. RLUIPA Has Once Again Changed the Legal Standard Governing Prisoner Free Exercise Claims, And The Latest Change Has Again Greatly Complicated Prison Administration.

Inmates' religious demands are a consistent aspect of correctional management, but the legal standards controlling those demands have been anything but consistent. The resulting uncertainty complicates the already difficult task of operating the nation's prisons and jails.

"Running a prison is an inordinately difficult undertaking that requires," among other things, "planning and the commitment of resources." *Turner v. Safley*, 482 U.S. 78, 84-85 (1987). Officials charged with that daunting task must daily strike a "delicate balance . . . between the order and security of the internal prison environment" and prisoners' First Amendment rights. *Thornburgh v. Abbott*, 490 U.S. 401,

407 (1989). Further, officials cannot simply react to problems as they occur. They are duty-bound to "anticipate security problems and to adopt innovative solutions to [] intractable problems," *Turner*, 482 U.S. at 89, in order to meet their Eighth Amendment obligation to address readily foreseeable threats. *Helling v. McKinney*, 509 U.S. 25 (1993).

Corrections officials must therefore balance several variables, each with varying weights, when deciding what religious activities to permit in their institutions. "In making these decisions, prison administrators focus primarily on specific security risks." *Developments in the Law of Prisons: IV. In the Belly of the Whale: Religious Practice in Prison*, 115 Harv. L. Rev. 1891, 1899 (2002) ("*In the Belly of the Whale*"). However, they must also consider "the administrative costs of a policy, the likelihood of inmate resentment, the appearance of discrimination, and the possibility of inmates manipulating the system for personal advantage—all of which are, to some degree, security concerns." *Id.*

That multivariate correctional facility calculus is made exponentially more difficult when the governing legal standard is also an uncertain variable, as it has been for far too long.

A variety of standards were applied before *O'Lone*, ranging from deferential rational basis review to strict scrutiny, resulting in what one court accurately characterized as "an unholy mess." *Udey v. Kastner*, 805 F.2d 1218, 1219 n.1 (5th Cir. 1986). *O'Lone* provided welcome guidance with its modified rational basis standard, but that stability was short lived.

A sea change occurred with the enactment of RFRA's least-restrictive-means standard in 1993. That prompted thousands of internal, and hundreds of judicial, demands to reexamine operational issues previously settled under the *O'Lone* standard. That period of reexamination lasted for

three-and-a-half years, until RFRA was struck down in June 1997, effectively reinstating the *O'Lone* standard. *See City of Boerne v. Flores*, 521 U.S. 507 (1997).

Things once again changed dramatically when RLUIPA became effective in September 2000. That law reinstates the same strict scrutiny standard imposed by RFRA and, like RFRA, has prompted reexamination of previously settled operational issues

In sum, the standards for evaluating prisoners' religious demands, demands that must be evaluated everyday in the nations' prisons and jails, have fluctuated wildly in recent years. The controlling standard has swung from one end of the legal continuum, rational basis review, to the other, "the most demanding test known to constitutional law," *City of Boerne*, 521 U.S. at 534, and the pendulum has swung three times over the last decade alone.

Reasonable people can disagree over Congress's constitutional authority to modify this Court's constitutional holding in *O'Lone*, but surely all agree that the frequent and dramatic swings in the law poorly serve all concerned. Consequently, the Court should act to end that unusual uncertainty by reviewing the validity of RLUIPA now, and by definitively establishing the law controlling prisoners' Free Exercise claims.

B. This Court Should Grant Review Now.

While the Ninth Circuit was the first court of appeals to address the constitutionality of RLUIPA, the Court should review this case now, rather than wait for further percolation in the courts, for several compelling reasons. First, the continuing uncertainty in this area impedes the States' ability to combat an increasingly urgent problem that causes significant human suffering every day—prison gangs. Further, nothing would be gained by delay, because the questions presented in California's petition are purely

legal, and hence need no further development in other cases. And prompt review of this issue would help to resolve a growing number of cases involving the questions presented.

1. Uncertain Legal Standards Impede The States' Ability To Address The Increasingly Urgent Problem Of Prison Gangs.

Prompt action to restore stability in this frequently visited area of the law is supported by the very real, and very dangerous, consequences of waiting. The uncertainty just discussed interferes with the States' ability to respond to the urgent problem of prison gangs, a problem with indisputable connections to both violence and "religious" activity behind bars.

It is hard to overstate the adverse impact of prison gangs. "The types of problems created by gangs include the introduction and distribution of drugs; intimidation of weaker inmates; extortion . . . ; requests for protective custody status; violence associated with gang activity; occasional conflicts between gangs (usually racial) that create disturbances and contracted inmate murders." G. Camp & C. Camp, *Prison Gangs: Their Impact, Nature and Impact on Prisons* (U.S. Dept. of Justice 1985) xi.

And those problems are not just administrative inconveniences. Prison gangs are responsible for violent acts that result in very real human suffering. *See, e.g., Fraise v. Terhune*, 283 F.3d 506, 512-513 (3rd Cir. 2002) (detailing the history of violence by a prison gang claiming religious status); *In re Long Term Segregation*, 174 F.3d 464, 466-467 (4th Cir. 1999) (same); *Johnson v. Martin*, 2002 U.S. Dist. Lexis 19246 (W.D. Mich. 2002), slip op. at **27-29 (same).

Those problems are increasing. Half of the respondents to a recent national survey of wardens reported a gang-related disturbance at their prisons within the year preceding the survey. G. Knox, *A National Assessment of Gangs and*

Security Threat Groups In Adult Correctional Institutions: Results From The 1999 Corrections Survey, Journal of Gang Research, Vol. 7, No. 1 (Spring 2000) 19. The percentage of respondents reporting gang-based assaults on prison staff more than tripled during the 1990s. *Id.* at 6-7. Fifty-five percent of respondents reported a significant gang-driven increase in homemade weaponry in their prisons, and supermajorities of respondents expect gang-related violence and related operational problems to increase in coming years. *Id.* at 26, 40. "Among the major warning signs that emerge from this study is that the vast majority of prison wardens at adult state correctional institutions do in fact believe that in the next few years the gang problem will dramatically increase behind bars." *Id.* at 40.

Unfortunately, prison gangs and religious activities are frequently connected. Prisoners' exploitation of the special protection given religious expression for less than holy purposes is well known on a general level, *In the Belly of the Whale*, 115 Harv. L. Rev. at 1902, 1906, 1908; *Udey*, 805 F.2d at 1220, 1221, and all involved in corrections recognize that gang-affiliated prisoners are particularly adept at manipulating those protections.

Reliable institutions verify the pattern of prison gangs exploiting Free Exercise protections. That pattern has been documented in a study commissioned by the federal Justice Department, a letter joined by all 50 state correctional administrators and a national survey of State Attorneys General. *See* G. Camp & C. Camp, *supra*, at 120, 141, 154, 155, 158, 175; *Congressional Record* S 14355 (daily ed. October 26, 1993); *Preliminary Results of the RFRA Survey of All States: The Impact of the Religious Freedom Restoration Act on State Correctional Facilities* (Florida Atty. Gen. 1996). The courts have likewise acknowledged that challenging reality. *See, e.g., Fraise*, 283 F.3d at 517; *Morris-Bey v. Debruyn*, 1997 U.S. App. Lexis 22440 (7th Cir. 1997), slip op.

at *3; *Johnson v. Martin*, 2002 U.S. Dist. Lexis 19246 (W.D. Mich. 2002), slip op. at **28-29: Academics, law enforcement professionals and civil liberties groups have also verified it. *See* G. Knox, *An Introduction to Gangs* (Wyndham Hall Press 1994) 27; R. Bonner, *The Brotherwoods: The Rise and Fall of a White Supremacist Gang Inside a Kansas Prison*, Journal of Gang Research, Vol. 6, No. 3, 72 (Spring 1999); *Behind the Walls: An Expert Discusses the Role of Race Related Gangs and Other Extremists in America's Prisons*, Southern Poverty Law Center Intelligence Report (Winter 2002) 26-27; *Dangerous Convictions: An Introduction to Extremists Activities in Prisons* (Anti-Defamation League 2003) 7, 34-35, 37. One expert put it well: "[g]ang members in prison know this routine: they go to chapel to act like they are a prayer group, but it is just a meeting place for the gang members to transact business." Knox, *An Introduction to Gangs*, *supra*, at 27.

The most persuasive proof comes from the gangs themselves. More than a third of the gang-affiliated prisoners surveyed admitted that their groups had used "religion as a 'front' for gang business." B. Zaitzow & J. Houston, *Prison Gangs: The North Carolina Experience A Summary of the Findings*, Journal of Gang Research, Vol. 6. No. 3 (Spring 1999) 29. A recent study of extremist groups in prisons provides a good example:

> An editorial in a recent issue of [a white supremacist publication targeting prisoners] sums up why [religion] has become important to incarcerated extremists: "This issue of *Strife* comes to you with a purpose, which is to encourage Bruder within the gulags to file an affidavit with their institutional chaplain requesting to be recognized as believers in Asatru (also known as Heathenism). This is necessary if we want to have a place within

> these dungeons where our people can congregate for educational purposes. Those of you who are not Odinists, we hope you will participate in and support this. The opportunity to congregate with our Folk is beneficial to all of us."

Dangerous Convictions, *supra*, at 38.

The lack of knowable Free Exercise standards is a significant impediment to the States' ability to respond to that troubling phenomenon. Between the uncertainty of what measures permissible under *O'Lone* will survive RLUIPA's least-restrictive-means test, and the inconsistent results between cases involving that test, officials are simply unsure what actions they may legally take to limit gang activities.

And the gangs know it. Gang-affiliated inmates were quick to exploit the uncertainty created by RFRA's seismic change in controlling legal standards and were persistent in manipulating RFRA to cast doubt upon anti-gang measures. *See, e.g., In re Long Term Segregation*, *supra*; *Ochs v. Thalacker*, 90 F.3d 293 (8th Cir. 1996); *Rojas v. Cambra*, 1997 U.S. Dist. Lexis 7610 (N.D. Cal 1997); *Morris v. Debruyn*, 1996 U.S. Dist. Lexis 11165 (N.D. Ind. 1996), *aff'd*, 124 F.3d 204 (7th Cir. 1997) (table). That pattern has re-emerged under RLUIPA, with white supremacist and other gangs invoking the Act in attempts to thwart anti-gang practices validated under the *O'Lone* standard. *Compare Gerhardt v. Lazaroff*, 221 F. Supp.2d 827 (S.D. Ohio 2002) (denial of separate group services for white supremacist inmates) *with McCabe v. Arave*, 827 F.3d 634 (9th Cir. 1987) (upholding such denials under the *O'Lone* standard) and *Ballard v. Campbell*, 1999 U.S. App. Lexis 23309 (6th Cir. 1999) (same). *Compare also Johnson v. Martin*, 223 F. Supp.2d 820 (W.D. Mich. 2002), and *Marria v. Broaddus*, 200 F. Supp.2d 280 (S.D.N.Y. 2002) (challenging increased restrictions on inmates adhering to "religious" groups with a history of gang affiliated violence) *with*

Fraise v. Terhune, 283 F.3d 506, 512-513, 517 (3d Cir. 2002) (upholding such restrictions under the *O'Lone* standard) and *In re Long Term Segregation*, 174 F.3d at 466-467 (same).

That uncertainty is compounded by the inherent unpredictability of the least-restrictive-means test. For example, prison officials know that some gangs use "religious" literature for various illicit purposes, they know that excluding that literature from prisons reduces violence, and they know that exclusion is therefore permissible under the *O'Lone* standard. But they do not know whether they can continue that practice, because they have received inconsistent decisions about the propriety of that action under the least-restrictive-means test. *Compare George v. Sullivan*, 896 F. Supp. 895 (W.D. Wis. 1995) *with Lawson v. Dugger*, 844 F. Supp. 1538 (S.D. Fla. 1994). Officials also know that gangs use jewelry and long hair as non-verbal "identifiers," that restricting access to those things impedes gang activities, and that they could take that preventive action under the *O'Lone* standard. But the continued propriety of that prophylactic measure under the least-restrictive-means test is unclear. *Compare Alameen v. Coughlin*, 892 F. Supp. 440 (E.D.N.Y. 1995) (invalidating an policy prohibiting religious article potentially used as a gang identifier under RFRA) with *Hamilton v. Schriro*, 74 F.3d 1545 (8th Cir. 1996) (upholding grooming regulation under RFRA intended to limit use of hair as a gang identifier).[1] That inconsistency proves the truth of this Court's observation that prison officials cannot be sure of any action surviving least-restrictive-means analysis because "every administrative judgment

[1] Although the anti-gang measure at issue in *Hamilton* was ultimately sustained on appeal, its operation was enjoined for almost two years, putting inmates and staff at risk during that period. *See Hamilton v. Schriro*, 863 F. Supp. 1019 (W.D. Mo. 1994).

[is] subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand." *Turner*, 482 U.S. at 89.

"Anyone familiar with prisons understands the seriousness of the problems caused by prison gangs . . . fueled by . . . religious bigotry," *Stefanow v. McFadden*, 103 F.3d 1466, 1472 (9th Cir. 1996), and no one can reasonably deny that such "religious" groups are responsible for numerous, and extremely serious, acts of violence in prisons across the country. The cumulative result of those hard realities and the constantly changing legal standards is less control, and hence more potential for violence, in the nation's prisons. Review can eliminate that uncertainty. And given the potential for additional, significant human suffering each day that uncertainty exists, this Court should act sooner rather than later.

2. The Questions Presented Are Ripe For Review Without Further Development, And Review Would Help To Resolve A Growing Number Of Cases Turning On Those Questions.

The Amici States recognize that the decision below is the first circuit-level precedent on RLUIPA's constitutionality, and of course, it is often appropriate to allow various factual patterns relevant to a challenged statute to be explored in the lower courts before this Court grants review. However, we submit that there are two reasons why that approach would not be appropriate here.

First, the nature of the questions presented belie the need for further factual development. Those questions are purely legal and turn on the constitutional boundaries of

Congress's power. Those boundaries are set by the Constitution, as interpreted in this Court's prior decisions, and additional factual development will not be relevant.

Second, review now will resolve many pending cases, or at least greatly aid in their resolution. Cases involving the same Separation of Powers, Spending Clause or Establishment Clause challenges to RLUIPA's prison provisions presented here are currently pending in many lower federal courts. *See* Appendix A. Review in this case could well resolve, or at least aid in the resolution of, those cases, alleviating their burdens on those courts.

CONCLUSION

For the foregoing reasons, the *amici* States urge the Court to grant California's petition.

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APPENDIX

Table of federal cases involving
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Goodman v. Snyder, Case No. 2000-C-498 (N.D. Ill.)

Eighth Circuit

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Tenth Circuit

Hammonds v. Saffel, Case No. 02-5009 (10th Cir.)

Ind. v. Wright, Case No. 00-B-428 (D. Colo.)

Eleventh Circuit

Benning v. State of Georgia, Case No. CV602139 (S.D. Ga.)

Wayne v. Wetherington, Case No. 5:02CV0460-02 (M.D. Ga.)

Limbaugh v. Thompson, Case No. CV93-D-1404-N (M.D. Ala.)

Hornsby v. State of Alabama, Case No. CV 95-T-385-N (M.D. Ala.)